JD(SF)–59–14
Honolulu, HI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HARRY ASATO PAINTING, INC.

and

Cases 20–CA–124382
20–CA–125157

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, PAINTERS
LOCAL UNION 1791

Jeff F. Beerman, Esq. and *Scott E. Hovey, Esq*.
for the General Counsel.

Bruce Mills, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Honolulu, Hawaii on October 21–23, 2014. The International Union of Painters and Allied Trades, Painters Local Union 1791(Charging Party, Union, or Local 1791) filed the charge in Case 20–CA–124382 on March 13, 2014, and filed the charge in Case 20–CA–125157 on March 25, 2014. The General Counsel issued the original complaint in Case 20–CA–124382 on May 30 and Harry Asato Painting, Inc. (the Respondent, HAP, or the Company) filed an answer on June 13. The Union filed the first amended charge in Case 20–CA–125157 on July 10, 2014, and filed the second amended charge on July 21. On July 31, the General Counsel consolidated the above-referenced cases and issued a consolidated complaint and notice of hearing. The Respondent filed an answer on August 12, denying all material allegations and setting forth affirmative defenses.

The Respondent filed a motion for partial dismissal on September 18, 2014, and the General Counsel filed an opposition on September 30, 2014. The Board issued an order denying the Respondent's motion on October 20, 2014.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Hawaii corporation with an office and place of business in Honolulu, Hawaii, provides painting services throughout the State of Hawaii. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (1) interrogating employees as to whether they wanted to remain Union members and/or continue to be represented by the Union for purposes of collective-bargaining and other activities; and (2) coercing employees into resigning their Union membership and resigning from the Union's apprenticeship program. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by making unilateral changes to employees' wages and benefits. Finally, the complaint alleges the Respondent violated Section 8(a)(5) and (1) by repudiating the collective-bargaining agreement and relationship with the Union. The Section 8(a)(5) allegations are premised on the General Counsel's theory that the Respondent and the Union were parties to a collective-bargaining agreement by virtue of their conduct.

II. STATEMENT OF FACTS

A. The Respondent's Operations

The Respondent's primary work consists of application of painted pavement markings, commonly referred to as "striping." Harry Asato (Harry) started Harry Asato Painting in 1958, and it has remained a family business. Glenn Asato (Glenn), Harry's son, has worked at the Company since 1976 and, has been its president for the last 10–15 years. Clifton Chung (Chung)[2] is HAP's vice president and field supervisor. Harry's wife, Deanne Asato (Deanne), is

[1] The scheduled due date for the briefs was December 1, 2014. Because of problems with the Board's efile system, the deadline was extended to December 2.

The Respondent filed a motion to disregard certain allegations in the General Counsel's trial brief on December 15, 2014. The General Counsel filed a response on December 16, 2014. The motion is hereby denied, as I find the General Counsel's brief appropriately addresses the complaint allegations.

[2] Chung was a member of the Union until roughly 2–3 years prior to the hearing. (Tr. 421.) Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for Respondent's exhibit;

the office manager. Harry and Deanne's son Wade Asato (Wade) works for HAP as an estimator. Ashlyn Asato (Ashlyn), who is married to Wade, has processed payroll for the Company since 2013. Glenn, Chung, Deanne, Wade, and Ashlyn serve on the Company's board of directors.[3] As of the end of 2013, HAP had nine employees performing striping work. Four of the stripers were classified as journeymen and five were classified as apprentices. Journeymen have completed an apprenticeship training program and are paid at a higher level than apprentices, who are still in training. All of the stripers at were Union members until the end of 2013. (GC Exhs. 11, 21; Tr. 229, 424, 448.)

B. The Union and Collective-Bargaining History

The Painters and Decorating Contractors Association of Hawaii (PDCA or Association) is an organization of employers engaged in the painting industry. One function of the Association is to represent its employer-members in negotiating and administering collective bargaining agreements with labor organizations. (Tr. 261.) The PDCA negotiates the agreements, and employers can choose whether or not to become signatories to the agreements.[4] The PDCA and the Union have had a series of successive collective-bargaining agreements pursuant to Section 8(f) of the Act. At any given time, the Union and the PDCA have been parties to only one collective-bargaining agreement.

The first collective-bargaining agreement between the Union and the Association went into effect on December 1, 1963, with HAP among the signatory contractors. (Tr. 262; GC Exh. 29.) HAP also signed the collective-bargaining agreements effective for the periods January 1, 1973–December 31, 1975, and February 1, 1993–January 31, 1998. (GC Exhs. 30, 31.) HAP did not sign the subsequent agreement, effective from February 1, 1998–Janaury 31, 2003, or any collective-bargaining agreement thereafter. (GC Exhs. 4, 32, 33; Tr. 220.)[5] Not coincidentally, at some point in and around 1998, HAP ceased its membership in the PDCA. This occurred because Harry did not get along with Etsuo Shigezawa, the executive director of the PDCA at the time. (Tr. 374–375.)

The most recent collective-bargaining agreement runs from February 1, 2013, through June 30, 2016. (GC Exh. 4.) Mitchell Shimabukuro (Shima),[6] a painter by trade, has served as a business representative for the Union since June 2011. He oversaw the contractors' signing of the most recent collective-bargaining agreement.

"GC Exh." for General Counsel's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief; and "R Br." for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

[3] Ashlyn is the board of directors' recording secretary.

[4] Employers can be signatories regardless of whether or not they are members of the PDCA. (Tr. 315.)

[5] Chelsea Lee, the Union's clerical supervisor, testified HAP stopped being a signatory in 1978, but it is clear she was a decade off.

[6] Shimabukuro is commonly referred to as "Shima"

The wage and benefit rates pursuant to the collective-bargaining agreements are set forth in "Exhibit A" of the successive collective-bargaining agreements. Each agreement contains a union-security provision at Section 5(B), requiring each new employee to become a member of the Union within 7 days of being hired, and to remain a member of the Union in good standing as a condition of employment. (GC Exhs. 4, 29–33.)

The District Council 50 (DC50) is the parent company of five local unions, including the Local 1791. Chelsea Lee (Lee),[7] clerical supervisor for the DC50, has been assigned to serve the Union since 2005.[8] In this capacity, she maintains a mailing list of contractors who have signed a collective-bargaining agreement with the Union. (Tr. 221.) The Union notifies all contractors on the list when new collective-bargaining agreements have been reached, and any other changes that impact the contractors. For example, on January 11, 2008, the Union sent HAP and the other painting contractors a cover letter along with a collective-bargaining agreement effective February 8, 2008–January 31, 2013. On May 1, she sent correspondence to regarding the current agreement to HAP and the other contractors. (GC Exhs. 15, 17–20; Tr. 193–194.) HAP was part of the list when Lee began work for the DC50, and had not asked to be removed from the list. (Tr. 233.)

The Union has not appointed stewards to any painting companies, including HAP. (Tr. 168, 329, 362.) Glenn did not recall the Union visiting HAP in the field, but Shima recalled one visit to a jobsite on Maui. (Tr. 168; 338.)

C. Union Apprenticeship Program and Wages

For most of its jobs, HAP is a subcontractor for a general contractor who, in turn, has a contract with the State of Hawaii, a county, or the federal government. (Tr. 92.) Generally, contractors and subcontractors performing work under a public works construction contract must pay at a rate no lower than the State-determined prevailing wage rate under Hawaii Rev. Stat. § 104–2 (2009) (Act 104). (GC Exh. 6.) With some notable exceptions described below, the rates set forth in Exhibit A of the collective-bargaining agreement are very similar to prevailing wage rate scales set by the State. One difference, however, is that apprentices can only be paid lower wages than the prevailing wage rate for journeymen if they are in an apprenticeship program approved by and registered with the State of Hawaii pursuant to Haw. Code R. § 22–12–6(1)(1996). (GC Exhs. 4, 29–33; Tr. 311.)

For 2013, pursuant to Exhibit A to the collective-bargaining agreement, journeymen were paid $34.10 per hour, and apprentices were paid based on the following formulations: 45 percent of journeyman rate for completion of 0–1,000 hours in the apprenticeship program; 50 percent for1,001–2,000 hours; 55 percent for 2,001–3,000 hours; 60 percent for 3,001–4,000 hours; 65 percent for 4,001–5,000 hours; 70 percent for 5,001–6,000 hours; 80 percent for 6,001–7,000 hours; and 90 percent for 7,001—8,000 hours. The foreman, Jebson Brown, was paid $34.60 in accordance with Exhibit A. (GC Exhs. 3–4; Tr. 276–277; 281–287.)

[7] Lee's maiden surname was Nam, which appears on some of the documents in the record.

[8] She was also assigned to the specialty workers at Pearl Harbor. Prior to being the clerical supervisor, she was an administrative assistant for the DC50.

The Union maintains a State-approved and registered apprenticeship program. Richard Vieira (Vieira) is the director of training for the Union's training program. In this capacity, he oversees the apprenticeship and other training for the Union. (Tr. 370–371.) When a contractor or subcontractor asks the Union's apprenticeship program for proof that an apprentice is enrolled, the Union submits a request to the State of Hawaii Workforce Development Division for verification that the named employees are officially registered in the Union's apprenticeship program. (GC Exhs. 7–8, 34; Tr. 378–380.) The contractors and subcontractors must submit payroll affidavits to prove that the apprentices who are not being paid the prevailing wage rate for journeymen are in an approved apprenticeship program. (Tr. 114–115.) HAP used the Union's apprenticeship program up until January 1, 2014, and paid its employees, including apprentices, the wage rates set forth in Schedule A of the successive collective-bargaining agreements. (GC Exhs. 3–5, 15, 21, 26; Tr. 94, 104, 119, 282–288.)[9] HAP received notices of any wage changes from the Union. (Tr. 433.)

A State of Hawaii law known as Act 17 (Haw. Rev. Stat. § 103–55.6 (2009)) provides a 5- percent bid discount on jobs greater than $250,000 to prime contractors that utilize apprentices in approved apprenticeship programs. (Tr. 109.) To qualify for the discount, the contractor must submit a State-created document entitled "Form 1, Certification of Bidder's Participation in Approved Apprenticeship Program under Act 17" along with the bid. On May 9, 2012, Cynthia Yamauchi,[10] who worked for HAP until her retirement at the end of 2012, sent a letter requesting that the Union sign certifications in connection with two jobs for which HAP intended to submit bids.[11] HAP and the Union signed another Form 1 on October 30, 2013. (GC Exhs. 9, 10.) In total, HAP has performed 4–6 jobs over the past 10 years pursuant to Act. 17, including the Kaumualii Highway project that began in 2011.[12] (Tr. 169, 447.)

D. Other Training

At Glenn's request, the Union has had specialized training on layout of parking areas and highways. (Tr. 384.) HAP employees also received first aid, CPR, hazardous awareness, and OSHA 30 training from the Union. (Tr. 413–414.)

E. Lien Releases

In order to get paid under public works contracts, subcontractors provide the contractor with a lien release from the Union certifying that the subcontractor is current on all trust fund payments and other obligations to the Union. (Tr. 120–122, 209–210.) The lien release letter the Union provides is a form letter which states that the contractor at issue has a collective-bargaining agreement with the Union and has paid all member-employee wages and fringe

[9] The parties stipulated to this fact. The record likewise reflects requests to the Union for verification of sponsorship. On September 19, 2013, Ashlyn sent an email to Joy Nakayama, the DC50's administrative assistant, seeking certification that seven listed apprentices had completed the apprenticeship program. (GC Exh. 7; Tr. 379.) She requested certification for another employee on November 19, 2013. (GC Exh. 8.)

[10] Yamauchi is Glenn's sister.

[11] HAP ultimately did not bid these jobs. (Tr. 118.)

[12] Vieira recalled receiving about 3–4 requests for certification under Act 17 from HAP in his capacity as the Union's training director. (Tr. 377.)

benefits consistent with the collective-bargaining agreement. The Union sent lien releases for HAP upon request, averaging about every couple of months through the end of 2013. (GC Exh. 24; Tr. 188, 212–213, 224.)

F. Employee Referral Process and Sponsorship

When Union workers are not employed, they are placed out on an out-of-work list (OWL) the Union maintains. When contractors who are parties to the collective-bargaining agreement need workers, they contact the Union for a referral from the OWL. The Union does not refer workers to contractors who are not parties to a collective-bargaining agreement with the Union.

Because striping is so specialized, the Union does not refer many stripers because they generally do not find themselves out of work. (Tr. 213–215.) A contractor that wants to hire a striper (or any other worker) directly, without using the Union's referral process, must sponsor the employee for Union membership before the employee can begin work. To this end, the contractor sends in a sponsorship letter to the Union stating they want to hire a particular individual. After the contractor requests sponsorship, the Union brings the workers in for a written test, an agility test, and a drug test. The Union then sends the contractor referral slips for each worker who passes the tests. The Union regularly undertook this practice for HAP through the end of 2013.[13] (Tr. 215–219, 274–275, 301; GC Exhs. 25, 26.)

G. Dues and Benefits

Through the end of 2013, HAP deducted union dues from employees' paychecks and remitted the dues to the Union each month. (Tr. 454–455.) HAP deducted three types of union dues from its employees' paychecks: checkoff dues, monthly membership dues, and job-targeting dues. Checkoff dues, sometimes referred to as 5–percent dues, consisted of 5 percent of an employee's pay for up to 40 hours. Monthly membership dues were $26.80 per month for each employee in 2013. Job-targeting dues are an assessment from members that goes into a fund to help subsidize union bids for contracts against non-union painting companies. As of the end of 2013, the job targeting assessment was $.85 per hour worked for journeyman, and a percentage of this for apprentices. The Union notified HAP and other painting contractors when assessments for the job-targeting program changed. HAP sent the Union 2 monthly checks: one check for the monthly and check-off dues and another check for the job-targeting dues. Lee, on the Union's behalf, verified that the correct amount of dues was remitted each month for HAP and the other painting contractors.[14] (GC Exhs. 21–23; Tr. 203–206, 298.)

Another difference is between the prevailing wage rate and the rates set forth in the collective-bargaining agreement is that the prevailing wage rate scale does not include employer contributions toward certain union trust funds. (Tr. 163, 277–278.) Specifically, the State of Hawaii's prevailing wage rate and benefits scale does not provide for contributions to the labor management cooperative fund, also referred to as the market recovery fund, but the collective-

[13] The form for the referral slip changed, with the current form represented at pages 1–2 of GC Exh. 26.

[14] The parties stipulated that HAP deducted and remitted union dues through the end of 2013.

bargaining agreement does. Accordingly, contributions under the collective-bargaining agreement were greater. For journeymen, the prevailing wage rate mandated by the State was $34.10 per hour as of September 2013, with fringe benefits equivalent to $26.05 per hour. HAP paid its journeymen $34.10 per hour with fringe benefits totaling $26.69 per hour. This was, with one exception noted directly below, consistent with the collective-bargaining agreement. (GC Exhs. 3, 6, 21; Tr. 278.)

From at least the 1970s until November 1984, HAP contributed on its employees' behalf to all of the Union's trust funds. After November 1984, HAP stopped contributing to the trade promotion and charity (TP& C) fund, which is used to finance the PDCA.[15] HAP continued to make contributions to the other funds through the end of 2013. (GC Exhs. 5, 27–28; Tr. 105, 169, 222, 240, 318, 364.) HAP stopped paying into the TP&C fund in November 1984 because Harry did not get along with the director of the PDCA at the time, and he did not think he was doing his job correctly. (Tr. 432.) Glenn believed that around this same time period, Harry and John Montrone (Montrone), a Union official at the time, entered into an oral agreement that HAP would pay Union wages and benefits, but would not have to pay into the TP&C fund.[16] (Tr. 257, 430–431.) No other employers have been granted this exception, regardless of their membership in the PDCA. (Tr. 257, 315–316.) No grievances or lawsuits were filed against HAP for failing to pay into the TP&C fund. (Tr. 343, 438.)

Group Plan Administrators, Inc. (GPA) is the contract administrator for the Union's funds. Aileen Amurakami (Amurakami) is one of the founders of GPA and has worked there since its inception in 1979, when the Union came on board as a client. Prior to 1979, Benefit Plan Consultants, where Amurakami was previously employed, administered the Union's trust funds. (Tr. 239.)

HAP completed a monthly transmittal form and a consolidated report documenting its contributions. The report, created by GPA, listed the names of the employees who performed work for the corresponding month, as well as the dues the funds to which HAP was to contribute on behalf of each employee. GPA provided the fund names and contribution rates based on Exhibit A of the collective-bargaining agreement in effect at the time. HAP was required to fill in, for each employee, the number of hours worked, gross pay, dues, annuity contribution, vacation pay contribution, and the fund contributions. The total contributions due for each fund consisted of the rate provided by GPA multiplied by the hours the employee worked. After HAP completed and certified the report as accurate, it sent the completed report, along with a remittance check, to First Hawaiian Bank, which, in turn, forwarded a copy to GPA. (GC Exh. 21; Tr. 204, 246–252, 255.)

Every 5 years, an independent auditor performed an audit of GPA's records of the fund contributions from contributing employers. With the exception of the TP&C fund, the audit reports have shown that HAP's fund contributions were consistent with Exhibit A of the successive collective-bargaining agreements.[17] (Tr. 253–254.) If a company was behind in a

[15] A single additional payment into the TP&C fund was made in November 1987.

[16] Glenn did not participate in the discussions between Harry and the Union relating to the oral agreement. (Tr. 130.) Nobody with firsthand knowledge of the oral agreement testified.

[17] The consolidated report for January 2012 shows HAP owed $437.70 for the TP&C fund. (GC Exh.

payment, GPA notified the Union. Until the end of 2013, for all funds other than the TP&C, HAP's payments were made on a timely basis in amounts consistent with the rates set for the in Exhibit A of the collective-bargaining agreements in effect at the time of the payments, including any changes the Union made to the fund contribution rates. (GC Exhs. 3, 19, 21–22; Tr. 245, 291–296.)

H. Correspondence and Discussions in 2013

On May 1, 2013, at Shima's direction, Lee sent HAP and the other painting contractors an invitation to attend a May 9 dinner at the Honolulu Country Club to celebrate ratification of a new collective-bargaining agreement. The invitation said the contractors would review and sign the document at the dinner, and meet some of the new leaders of the DC50. (GC Exh. 18; Tr. 304.) This was the first time since 1998 the Union approached anyone from HAP about signing a new collective-bargaining agreement. (Tr. 332–333.) Nobody from HAP attended the dinner. (Tr. 231, 435.)

Also on May 1, Lee sent to the painting contractors a revised Exhibit A to the collective-bargaining agreement, delineating wage and benefit rates. The changes reflected in the revised rate schedule were decreases in the required contributions to the labor management cooperative fund and the reserve benefit fund, and an increase in the required contribution to the training fund. (GC Exh. 19.) HAP changed the rates it contributed toward these funds consistent with the changes reflected in the revised Exhibit A. (Tr. 296.)

On May 10, Lee sent HAP and the other painting contractors an email stating that the 2013–2016 collective-bargaining agreement had been approved statewide. The email asked those contractors who had not attended the dinner to come to the Union's office or make alternative arrangements to sign the collective-bargaining agreement. (GC Exh. 20.) That same day, she sent a document called the "Lost Market Agreement" which described the work that would be performed under the Union's job-targeting program. (R Exh. 3; Tr. 444–446.)

On July 5, 2013, Shima sent an email to Glenn asking to meet and discuss any concerns HAP had about signing the collective-bargaining agreement. (R. Exh. 2; Tr. 359.) He had not realized that HAP had not signed the collective-bargaining agreement that had expired on January 1, 2013, until March 2013. (Tr. 322, 328, 354–355.) Shima did not think the email was a request to bargain; Glenn did. (Tr. 359, 365; 442.)

On July 9, 2013, Shima met with Glenn and Chung at HAP's offices to discuss signing the collective-bargaining agreement. According to Shima, Glenn expressed concerns with the agreement, mentioned a gentleman's agreement, and said he was in a "marriage that he cannot get out of." (Tr. 307.) Glenn recalled telling Shima that he wanted to discuss the contract and how it would affect HAP. He also wanted the Union to provide training tailored to the stripers' work. (Tr. 439–440.)

At some point, Glenn mentioned that GP Roadway solutions had been taking work away from HAP, and if the Union could sign GP Roadway systems, HAP would sign the collective-

21, p. 3.) The Union's trust fund lawyers never contact HAP about this. (Tr. 366.)

bargaining agreement. (Tr. 307–308.) Glenn recalled saying that he would consider signing the agreement if GP Roadway Solutions signed because it would help level the playing field. (Tr. 453.)

On September 3, 2013, Shima had a lunch meeting with Wade and Chung at the Eagle Café. Shima explained the Union's job-targeting program, and explained how he thought it would benefit HAP. He gave Chung a copy of the job-targeting program. (Tr. 497–500; GC Exh. 36.)

On November 21, 2013, Shima and Glenn met again to discuss the job-targeting program. Glenn requested to meet with the Union's business manager, Ryden Valmoja. (Tr. 308–312.) On December 19, Shima and Valmoja met with Glenn, Wade, and Chung. Glenn said that if HAP could pick the charity for the trade promotion and charity fund, he would sign the collective-bargaining agreement. Shima asked the PDCA director if HAP could determine where their TP&C funds went, and was told this was not possible. He conveyed this to Glenn. (Tr. 313–315.)

Near the end of 2013, the Shima told Glenn that it would no longer certify HAP for Act 17 purposes unless they signed a contract. During the same time period, the Union threatened to stop providing lien releases, cease permitting HAP to use its apprenticeship program, and cease sending HAP Union employees, unless HAP signed the current collective-bargaining agreement. (Tr. 171, 326, 438, 459–460.) No previous Union official had asked or required Glenn to sign the collective-bargaining agreement. (Tr. 433–434, 437.)

During one of the meetings, Shima told Glenn that one of the reasons he was pursing HAP to sign the collective-bargaining agreement was because it has a favored-nations clause. Under this clause, if one contractor is given a deal or a benefit, all other contractors must be offered the same deal or benefit. (Tr. 367–368.)

I. December Meeting with Employees and Union Resignation Letters

All of the employees were called into a meeting on December 27, 2013.[18] A form letter of resignation from the Union drafted by HAP, dated December 27, was given to the employees with the rest of their morning paperwork. (GC Exh. 11; Tr. 396.) HAP drafted all portions of the resignation letter except the employee's signature, printed name, and last 4 digits of the employee's social security number. It stated:

Date: 12/27/2013

International Union of Painters
And Allied Trades
Painters Local Union 1791
2240 Young Street

[18] Glenn thought the meeting was before December 27, but the employees testified it was on December 27, and recalled the meeting took place the day they were given forms bearing the same date. I therefore find the weight of the evidence shows the meeting occurred on December 27.

Honolulu, Hawaii 96826

To Whom It May Concern:

This letter is to notify you that effective December 31, 2013, I am resigning from the Painters Local Union 1791 and no longer want the Painters Local Union 1791 to represent me.

Please have the Health and Pension Funds contact me about withdrawing from them.

Signature: _____

Printed Name: _____

Last 4 digits of social security number: _____

(GC Exh. 11.) No employee requested that HAP draft the resignation letter.

Glenn told the employees what Shima said would occur if HAP did not sign the collective-bargaining agreement, and conveyed that the Union had given them an ultimatum. (Tr. 136, 461.) James Fortner, a Union member, worked for HAP from October 2012–July 2014. He recalled being told that HAP decided not to re-sign with the Union, but it was the employees' choice whether or not to sign the letter resigning from the Union. They were given until December 31 to decide. Fortner perceived that HAP had work for the employees who signed the resignation. He felt as if he didn't sign, he might have been "riding the bench"[19] because not too many companies do striping work. (Tr. Tr. 136–137.) He believed he would not continue employment with HAP if he did not sign the letter, and he signed it because HAP had the work he was trained to perform. (Tr. 140, 144.) Nobody at HAP threatened him if he did not sign it, nor was he assured there would be no discipline. (Tr. 146, 148.)

Shawnson Batungbacal worked for HAP from January 2013–January 2014. On December 27, 2013, he was not scheduled to work, but received a group text message to go to the shop for a meeting. At the meeting, HAP managers told the employees they wanted to get out of the Union. The employees were given the choice to "follow them or stay a member of the union." (Tr. 153–154.) Batungbacal believed that if he did not sign the form resigning from the Union, he would not be able to work for HAP. He also thought he could not work for a nonunion company in the same trade if he was a member of the Union, so he signed the letter. He was not threatened, and believed it was his choice whether or not to sign the letter. (Tr. 155–160.) He stopped working for HAP in January 2014 because they decided to get out of the Union. (Tr. 153.)

[19] Riding the bench is the same as being put on the OWL.

Dionne Kaneshiro has worked as a striper for HAP for more than 7 years. She attended the meeting, and recalled Glenn telling employees they had a choice as to whether or not they wanted to stay with the Union. Kaneshiro resigned from the Union by signing the resignation form. She did not feel coerced by Glenn, nor was she made promises in exchange for resigning. She did not think she could work for HAP if she stayed with the Union if the Company decided to go nonunion. (Tr. 395–397.)

Jebson Brown, a foreman, has worked for HAP since 2005. He recalled that Glenn gave the employees the choice to decide whether to stay Union or go nonunion. He decided that he wanted out of the Union. He signed the resignation form, and delivered his and the other employees' signed forms to the Union. (Tr. 410–413.)

Chung recalled that Glenn gave the employees the option of staying with the Union or leaving it, and that if employees resigned from the Union, HAP would no longer recognize it. Glenn did not express a preference regarding whether employees resigned from the Union. (Tr. 422.)

On December 27, 2013, all nine employees signed letters resigning from the Union, effective December 31. Empoyee Jebson Brown delivered the resignations to the Union on December 27. (GC Exh. 11; Tr. 123–124.)

On March 27, 2014, Glenn sent a letter to the Union stating that, effective December 31, 2013, a majority of the HAP employees resigned from the Union, and therefore HAP had decided not to sign the current collective-bargaining agreement. He informed the Union that because it did not represent a majority of the HAP employees, any contractual relationship between HAP and the Union was repudiated. (GC Exh. 13; R Exh. 4; Tr. 448.) He based his understanding of the Union's loss of majority status on the resignation letters the employees signed. (Tr. 450–451.)

J. Employee Affidavits

On various dates between mid-April and early May, employees signed declarations, prepared by HAP's attorney, stating that their respective resignations were voluntary and not coerced in any manner. The declarations were on Attorney Bruce Mills' letterhead. (GC Exh. 12; Tr. 125–126, 142, 398.)

Each employee has a tray at work with his or her name on it. Kaneshiro found the declaration in her tray. She did not ask anyone to prepare the document. When she received declaration, her name was already typed on it. Nobody from HAP management discussed the declaration with Kaneshiro, either before or after she signed it. (Tr. 405–407.)

Fortner received the declaration on April 21, 2013. Glenn called him up to his office in the morning and handed Fortner the declaration. Fortner's name was pre-typed on the document. Fortner looked at it and signed it. He and Glenn did not discuss the declaration. (Tr. 142–143.)

K. Wages and Benefits in 2014

As of January 1, 2014, HAP has administered its own benefits and training. (Tr. 441, 487–493.) All apprentices were reclassified as Laborer II's for prevailing wage rate purposes until they enrolled in another State-certified apprenticeship program. (Tr. 134, 479.) For purposes of doing payroll, Ashlyn got the prevailing wage rates from the State of Hawaii's website. (Tr. 478.) Fortner's pay increased after January 1, 2014, because he went from an apprentice to a Laborer II.[20] (Tr. 146–147, 171.) Kaneshiro was close to completion of her apprenticeship when she resigned from the Union. Her pay decreased by a dollar per hour. (Tr. 401–402.)

Also since the beginning of 2014, HAP has administered employee benefits pursuant to an in-house general ledger account. The contribution amounts for the vacation fund, annuity funds, and training funds remained the same. The health and welfare contribution went from $6.35 per hour in 2013 to $6.85 per hour on January 1, 2014. HAP ceased paying into a pension fund and labor management cooperative fund. (Tr. 487–492.)

At the time of the hearing, HAP's apprentices were enrolled in the American Builders and Contractors (ABC) certified apprenticeship program. (Tr. 170, 470.)

III. Decision and Analysis

A. Adoption of Collective-Bargaining Agreement

The complaint asserts violations of Section 8(a)(5) and (1) of the Act. As a threshold issue, I must determine whether the Respondent adopted, by virtue of its conduct, the most recent collective-bargaining agreement, effective February 1, 2013–June 30, 2016. The General Counsel's burden to prove an employer has adopted a contract by its conduct is clear and convincing evidence, a higher burden than the typically-applicable preponderant standard. See, e.g*., Brookville Health Care Center*, 337 NLRB 1064, 1068 (2002); *Resco Products*, 331 NLRB 162, 165 (2000); *Field Bridge Associates*, 306 NLRB 322, 323 (1992), enfd. 982 F.2d 845 (2d Cir. 1993); *EG & G Florida, Inc*., 279 NLRB 444, 453 (1986); *All State Factors*, 205 NLRB 1122, 1127 (1973).

It is well settled that adoption of a collective-bargaining agreement "is not dependent on the reduction to writing of the intention to be bound," but instead, "what is required is conduct manifesting an intention to abide by the terms of the agreement." *E.S.P. Concrete Pumping, Inc*., 327 NLRB 711, 712 (1999), quoting *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 355–356 (5th Cir. 1981) (en banc) (footnotes and citations omitted), enfg. 236 NLRB 79 (1978); *The Palm Beach Pops*, 343 NLRB No. 27 (2004); *Cab Associates*, 340 NLRB 1391 (2003).

The Board made clear in *E.S.P. Concrete Pumping*, supra at 711, that "the principles of 'adoption by conduct' of a collective-bargaining agreement, properly understood, are applicable to agreements covered by Section 8(f) as well as Section 9(a)." The Board had previously stated, in dicta, that it did not find the "adoption-by-conduct rule applicable in 8(f) cases." *Garman Construction Co*., 287 NLRB 88, 89 fn. 5 (1987). *E.S.P. Concrete Pumping*, however, expressly overruled *Garman*. 327 NLRB at 712. The Board's rationale stated, in relevant part:

[20] At the time of the hearing, Fortner worked for Apply Line as a union member. (Tr. 145.)

> Nothing in the text or legislative history of Section 8(f) requires the Board to depart from its traditional principles of contract interpretation, including the adoption by conduct doctrine, in 8(f) cases. Section 8(f) provides, in pertinent part, that it shall not be an unfair labor practice for an employer and a union in the construction industry to "make an agreement" without the union first having established its majority status pursuant to Section 9 of the Act. Except for its mandate that such agreements be voluntary, there is no indication that Congress intended to establish special rules for the "making" of such agreements. *See Scandia Stucco Co*., 319 NLRB 850, 855 (1995) (agreement to engage in multiemployer bargaining for an 8(f) contract need not be manifested by a written agreement).

Id. at 713. *E.S.P. Concrete Pumping* has been cited with approval by the Board as well the Court of Appeals for the Ninth Circuit. See, e.g., *DST Insulation, Inc*., 351 NLRB 19, 19–20 (2007); *S. Cal. Painters & Allied Trade Dist. Council No. 36 v. Best Interiors*, 359 F.3d 1127, 1130 (9th Cir .2004).[21]

Whether a particular course of conduct manifests intent to follow the terms of a collective-bargaining agreement is a question of fact. *DST Insulation*, supra; *Arco Electric Co*. v. NLRB, 618 F.2d 698 (10th Cir. 1980). Where an employer engages in "substantial conduct manifesting an intent to be bound" to the collective-bargaining agreement, the Board has found adoption of it by the employer's conduct. *DST Insulation*, supra at 20. There is no one factor that is determinative in showing substantial conduct sufficient to bind an employer. Some factors the Board considers are whether the employer pays employees' wages (including wage increases) in accordance with the collective-bargaining agreement, makes fringe benefit contributions for employees in accordance with the collective-bargaining agreement, honors an agreement's union-security clause, deducts and remits union dues, uses the union to secure employees, corresponds with the union in a manner consistent with the status of a union contractor, holds itself out as a union contractor to obtain benefits, submits reporting forms stating it is in compliance with the terms of the collective-bargaining agreement, permits the union to appoint a shop steward, and consults with the union prior to working outside the schedule set forth in the collective-bargaining agreement. See *Best,* supra; *Haberman Constr. Co*., 641 F.2d at 356–357; *Arco Elec. Co. v. NLRB*, 618 F.2d 698, 699–700 (10th Cir.1980); *Cab Associates*, supra.; *Vin James Plastering Co*., 226 NLRB 125 (1976); *Marquis Elevator Company, Inc*., 217 NLRB 461, 465–466 (1975). The Board in *E.S.P. Concrete Pumping* also considered relevant the fact that the employer acquiesced in a judgment against it for unpaid contributions to a union pension fund.

Considering the totality of the evidence, I find there was substantial compliance sufficient to bind HAP to the most recent collective-bargaining agreement.[22] The evidence clearly and convincingly shows that HAP paid wages in accordance with the collective-bargaining

[21] Prior to *Garman*, the Board and many courts had held the adoption-by-conduct theory was applicable to collective-bargaining agreements under both 9(a) and 8(f). See, e.g., *N.L.R.B. v. Haberman Const. Co*. 641 F.2d 351 (5th Cir. 1981); *Arco Elec. Co. v. NLRB*, 618 F.2d 698, 699–700 (10th Cir.1980).

[22] Because of statute of limitations set forth in Section 10(b) of the Act, I am basing my decision on adherence to the most recent collective-bargaining agreement. I consider historical adherence to earlier agreements as background evidence only.

agreement. As set forth in the statement of facts, HAP paid its foreman, journeymen and apprentices in accordance with the wage rates set forth in Exhibit A. The rate for journeymen was $34.10 on both the prevailing wage rate scale and Exhibit A, so HAP adhered to both scales. The prevailing wage rate scale from the State of Hawaii does not include a rate for foremen. HAP paid Foreman Brown more than it paid its journeymen, in accordance with Exhibit A, and sent correspondence to the Union notifying them that Brown's wages and benefits should reflect his status as a foreman. For apprentices, HAP likewise paid in accordance with the collective-bargaining agreement, as its rates clearly correspond with the wage rate percentages for apprentices set forth in Exhibit A.[23] This was to take advantage of Act 104, which permitted HAP to pay lower than the prevailing wage rate by virtue of its use of the Union's apprenticeship program.

Moreover, HAP changed the pay rate of its apprentices, effective January 1, 2014, to that of Laborer II to conform to the State's prevailing wage rate scale. Some apprentices saw their pay increase while and others saw their pay decrease, depending on how far along they were in their apprenticeship program, and, correspondingly, their previous pay rate as reflected by Exhibit A.

In addition to paying wages equivalent to those specified in Exhibit A, HAP also paid into all but one of the Union's trust funds on behalf of its employees. HAP stopped paying into the TP&C fund in 1984, while it was still a signatory to the collective-bargaining agreement in effect at the time. Thus, its continued nonpayment into the TP&C fund was consistent with its performance under the bulk of the last collective-bargaining agreement it signed, effective February 1, 1993–January 31, 1998. The benefit contributions HAP made on its employees' behalf were greater than the prevailing wage contributions required by the State of Hawaii, and consistent with Exhibit A, with the exception of the TP&C fund. Moreover, HAP implemented increases to the training fund, labor management cooperative fund, and the reserve benefit fund in 2013, consistent with Exhibit A.

Payment of wages and benefits pursuant to a collective-bargaining agreement, however, does not by itself establish intent to be bound by it. *Cimato Brothers, Inc*., 352 NLRB 797, 800–801 (2008). In the instant case, there was much more than payment of wages and benefits. The evidence shows that HAP enjoyed some benefits by complying with certain terms of the collective-bargaining agreement. By paying its apprentices less than the prevailing wage rate for journeymen in accordance with Exhibit A, the Respondent also availed itself of the benefits of Act 104. In addition, HAP took advantage of the 5-percent bid discount under Act 17 by certifying that its apprentices were enrolled in the Union's apprenticeship program.

Moreover, through 2013, HAP routinely requested and obtained lien release letters from the Union in order to secure payment from contractors. The letters explicitly stated that HAP and the Union were parties to a collective-bargaining agreement, and that HAP had paid all member-employee wages and fringe benefits consistent with the agreement. The Board has

[23] At the hearing, the General Counsel provided evidence through a sampling of apprentices. I invited the Respondent to point out any instances where the rate for an apprentice did not match the rate in Exhibit A. No such discrepancy was forthcoming, and my independent review of the document shows the employees were paid consistent with the rates set forth in Exhibit A.

found that when an employer deliberately holds itself out as a union contractor and obtains the benefits of a union contract, this is a "significant factor in determining whether there has been adoption by conduct, because an employer could otherwise secure all the benefits of labor stability without any corresponding obligations." *DST Insulation,* supra at fn. 7. In addition, the correspondence between HAP and the Union with regard to lien releases was conducted "in a manner that was consistent with the status of a union contractor," another relevant factor. Id. at 20.

The evidence further shows that HAP complied with the union-security provision in the collective-bargaining agreement. As noted above, Article 5(B) of the successive collective-bargaining agreements required each new employee to become a member of the Union within 7 days of being hired, and to remain a member of the Union in good standing as a condition of employment. In compliance with this provision, HAP secured its workforce by sponsoring its employees for Union membership. Through 2013, HAP sent letters to the Union when they wanted to hire a striper requesting that the Union sponsor the employee. The Union then administered tests and sent referral slips to HAP for the workers who passed the tests and had become Union members.

Another highly relevant factor is that the Respondent, through the end of 2013, deducted union dues from employees' paychecks and remitted the dues and job targeting assessments to the Union each month, as detailed in the statement of facts. This, in conjunction with HAP's compliance with the union-security provision and payment of fringe benefit contributions, undermines HAP's argument that there was no agreement. As best described by the Court of Appeals for the Seventh Circuit in *U.S. Can Co. v. NLRB*, 984 F.2d 864 (7th Cir. 1993), enfg. 305 NLRB 1127 (1992), for an employer to state there is no agreement while simultaneously enforcing a union-security provision and deducting and remitting dues and other payments runs afoul of the Labor Management Relations Act, 1947, § 302(a)(2), (c)(4), 29 U.S.C.A. § 186(a)(2), (c)(4) and National Labor Relations Act, § 8(a)(3), as amended, 29 U.S.C.A. § 158(a)(3):

> Checkoffs of dues and other payments from the employer to the union, like the enforcement of a union-security clause, depend on the existence of a real *agreement* with the union. 29 U.S.C. § 186(c)(4); *Bethlehem Steel Co*., 136 N.L.R.B. 1500, 1502 (1962), enforced in relevant part under the name *Marine Workers v. NLRB*, 320 F.2d 615, 619 (3d Cir.1963); *Southwestern Steel & Supply, Inc*. v. NLRB, 806 F.2d 1111, 1114 (D.C.Cir.1986). Cf. *Litton* [*Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991)]. Otherwise the payment of money is a subvention barred by 29 U.S.C. § 186(a)(2), and the requirement to join the union (or pay dues to it) coerces employees in a way forbidden by 29 U.S.C. § 158(a)(3). Having done things that are lawful only if a collective bargaining agreement is in force, U.S. Can is in a pickle. For neither labor law nor the common law of contracts permits one to riffle through terms, building a "contract" out of the ones you like while discarding the rest.

[Emphasis in original.] See also *DST Insulation*, supra at 20 ("An obligation to pay dues is permissible only during the existence of a collective-bargaining agreement containing a union-security provision.")

Though HAP never employed a shop steward, the evidence was unrefuted that the Union did not utilize shop stewards at any of its painting companies.

"Nothing in the legislative history of Section 8(f) indicates that Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper." *Jeff McNeff, Inc. v. Todd*, 461 U.S. 260, 271 (1983). In the instant case, HAP availed itself of many of the benefits of a union contract, and nonetheless claimed that there was no contract. Under Board law, HAP cannot have it both ways. Based on the foregoing, I find the General Counsel has met its burden.

The Respondent asserts that I should apply *Garman*, supra, because the alleged oral agreement Harry and Montrone negotiated was in 1998, and *Garman* was good law at the time.[24] The precise timing of the alleged oral contract and its precise terms was never established, however. In any event, for purposes of my decision, I am not evaluating performance under an oral agreement established years ago; I am evaluating whether HAP's conduct made it a party to the most recent collective-bargaining agreement under the Board's standards, as articulated above.[25]

Moreover, the only evidence of record regarding the oral agreement addresses HAP being excused from paying into the TP&C. The Respondent contends, without evidentiary support, that this agreement encompassed much more. (R Br. 17–21.) These assertions hold no evidentiary value, however. As noted above, HAP's contributions to the TP&C fund stopped while they were still a signatory to the collective-bargaining agreement in effect at the time. The failure to pay into this fund in no way implicates an overall agreement that HAP could reap other benefits of the collective-bargaining agreement without being bound by it.

The Respondent further argues that paragraphs 6(e)(f) and(g) should be dismissed because they fall outside the requirements of Section 10(b) of the Act. These complaint paragraphs state:

> (e) About February 1, 1998, and at all material times thereafter, Respondent adopted by conduct subsequent collective-bargaining agreements entered into by the Union and the Association by, among other things, paying wages and making trust fund contributions in accordance with subsequent collective-bargaining agreements, utilizing the Union's hiring hall, and withholding and tendering Union dues deducted from employees' paychecks.
>
> (f) About February 1, 2013 through December 31, 2013, Respondent adopted, by the conduct described in subparagraph 6(e), the collective-bargaining agreement entered into by the Union and the Association, effective from February 1, 2013 through June 30, 2016

[24] As previously noted, *Garman's* statement that contract-by-conduct did not apply in the 8(f) context was *dicta*, and the Board and courts had found contracts by conduct before *Garman* in the 8(f) context.

[25] The Respondent requests that I dismiss the allegations in portions of paragraph 6 of the complaint. (R Br. 24–30.) As discussed on the record and stipulated to by the General Counsel, the complaint does not allege that anything in paragraph 6 constitutes a violation of the Act, and it only contains background information. (Tr. 9–10.)

(the Agreement), which encompasses the terms and conditions of employment of the Unit.

(g) By adopting the collective-bargaining agreement described in subparagraph 6(f), Respondent recognized the Union as the exclusive collective- bargaining representative of the Unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act.

The Board rejected this argument when it denied the Respondent's partial motion to dismiss, and therefore so must I.[26] Nonetheless, I will briefly address a case the Respondent relies upon that was not argued to the Board in the motion to dismiss. Citing to *A & L Underground Inc.*, 302 NLRB 467, 469 (1991), the Respondent argues that the Union knew or should have known in 1998 that HAP would not be a signatory, and therefore charges should have been filed long ago. There is nothing unlawful about HAP deciding not to sign the agreement, however, so it is unclear why charges should have been filed in 1998, absent evidence that HAP had decided to totally refute it. The Board makes a distinction between "simple failure to abide by the terms of a collective-bargaining agreement," and "outright repudiation of the agreement itself," or "total repudiation."[27] *Vallow Floor, Coverings, Inc*, 335 NLRB 20 (2001), citing *A & L Underground* supra. There is no evidence to show the Respondent repudiated the agreement in its entirety, and the evidence detailed above clearly reflects otherwise. Accordingly, the Respondent's timeliness argument based on Section 10(b) fails.

B. Alleged Repudiation

Paragraphs 9 and 11 of the complaint alleged that by letter dated March 27, 2014, the Respondent repudiated the February 1, 2013–June 30, 2016 collective-bargaining agreement and its collective-bargaining relationship with the Union, in violation of 8(a)(5) and (1).

The Board defined the obligations of an employer who enters into an 8(f) agreement in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988). The Board in *Dekwela* held that such agreements are enforceable under Section 8(a)(5) of the Act, and may not be unilaterally repudiated during their term. See also, *Gem Management Co*., 339 NLRB 489, 501 (2003); *AEi2, LLC*, 343 NLRB 433 (2004). An employer that has voluntarily adopted a contract, therefore, is foreclosed under Deklewa from repudiating it during its term, even where the contract is adopted through the employer's conduct as opposed to a signed agreement. *E.S.P. Concrete Pumping*, supra at 712 (1999). The only way for an employer to get out of the terms of

[26] I note that the Respondent relied on *Local Lodge 1424, Machinists v. NLRB*, 362 US 411 (1960), *Lorance v. AT & T Technologies*, *Inc*., 490 U.S. 900 (1989), and *Ducane Heating Corp.*, 273 NLRB1389 (1985), in support of its argument. These cases were argued to the Board, which rejected the Respondent's motion to dismiss, and I therefore will not analyze them separately in this decision.

[27] Some testimony at the hearing, referenced in the statement of facts, appeared to imply that the Respondent intended to assert that HAP thought it was negotiating a new agreement in 2013. The Respondent does not argue this in its brief, and to do so would not be fruitful. It is clear that at most what Respondent sought from the Union was additional training, not bargaining for an initial labor agreement. See *300 Exhibit Services & Events, Inc*., 356 NLRB No. 66, slip op. at 8 (2010).

an 8(f) agreement is if "the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative." *Dekwela*, supra at 1385.

I have found that HAP voluntarily adopted the collective-bargaining agreement. There was no Board-conducted election decertifying the Union, and therefore the Respondent's repudiation of the collective-bargaining agreement prior to its expiration on June 30, 2016, violated the Act. The Respondent's argument that the Union had lost majority support, aside and apart from whether that loss was the result of coercion, fails in light of established Board law. Id., see also *300 Exhibit Services & Events, Inc*., 356 NLRB No. 66, slip op. at 8 (2010). Accordingly, I find the General Counsel has met its burden to prove the allegations in paragraphs 9 and 11 of the complaint.

C. Alleged Interrogation and Coercion

1. December 27, 2013

Complaint paragraph 7(a) and 10 allege that the Respondent interrogated employees at the December 27, 2013, meeting about whether they wanted to remain union members and coerced employees into resigning their union memberships and resigning from the Union's apprenticeship program, in violation of Section 8(a)(1) of the Act.[28] Under Section 8(a)(1), it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Rights guaranteed by Section 7 include the right to engage in union activities and "concerted activities for the purpose . . . of mutual aid or protection."

Polling employees about their union sympathies can constitute a form of interrogation. *Vaughan Printers*, 196 NLRB 161, 164 (1972). For the polling to be lawful, all of the safeguards required under *Struksnes Construction Co*., 165 NLRB 1062 (1967), must be applied as follows:

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Id. at 1063. See also *Johnnie's Poultry*, 146 NLRB 770, 775 (1964); *HTH Corp*., 356 NLRB No. 182, slip op. at 8 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012).

[28] The Respondent argues that the General Counsel did not specify what section of the Act the allegations in paragraph 7(a) violated. (R Br. 35.) The complaint clearly provides this information in paragraph 10. The same holds true for similar arguments the Respondent makes about other sub-paragraphs; Paragraphs 10 and 11 very plainly relate which violations of the Act are alleged to be violated by the specified preceding paragraphs.

Here, as in *HTH Corp*., HAP polled the employees concerning their desire to stay with the Union after providing them with the Company's point of view, and implied threat of job loss. Batungbacal and Fortner provided unrefuted testimony that, after recounting Shima's statements regarding what would occur if HAP did not sign the collective-bargaining agreement, HAP management officials stated they were going to cut ties with the Union. I found their testimony to be credible. Both testified with an open and forthright demeanor, did not embellish or dramatize what occurred, and genuinely appeared to be truthful. Moreover, their testimony that they felt they needed to resign their union membership to remain employed at HAP is inherently more plausible if they were told, or led to believe, that HAP was not going to cut ties with the Union. As Fortner stated, "It was our choice to either continue with them [HAP] or—by signing the resignation paper—or you would just take your chances with the Union." (Tr. 139.) It is clear that Fortner did not sign the form out of a genuine desire to resign from the Union, since he re-joined the Union to work at his present position as a union striper for another company. Batungbacal likewise did not sign the form out of a desire to resign from the Union, as he stopped working for HAP in January 2014 based on HAP's decision to get out of the Union. In addition, I credit Fortner and Batungbacal's testimony because they have nothing to gain or lose by being forthcoming and truthful. Both left HAP voluntarily to pursue other jobs. There was nothing in either witness' demeanor or in the evidence presented to indicate either of them harbored a grudge against the Respondent

The evidence is also clear that employees were not provided with assurances against reprisal. The poll was not taken to ascertain the truth of the Union's claim of majority status, as there is no evidence any such claim had been presented. The employers were not polled by secret ballot. I further find that, although the employees who testified stated they were not coerced, the atmosphere was inherently coercive. Every employee asked about his or her perception about what would occur if they did not sign testified they believed they would be out of work if they did not resign from the Union and HAP withdrew its recognition of the Union. See *Manhattan Eye, Ear & Throat Hospital*, 280 NLRB 113, 115 (1986).

The employees testified that HAP managers never expressed a preference for whether the employees decided to stay with the Union or resign, and stated they did not feel coerced. The Respondent's action of drafting the resignation letters for employees to sign, however, is a glaringly clear an indication of HAP's preference. Preparation of the letters also constitutes assistance in facilitating the resignation. See *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997). Under these circumstances, and particularly considering the lack of safeguards under *Struksnes Construction Co*., I find the General Counsel has proved the allegations set forth in paragraphs 7(a) and 10.

The Respondent argues that the resignation letter and the meeting were protected by Section 8(c) of the Act, which states in relevant part:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

The Board has held, however, through the caselaw cited above, that the expressions here crossed the line and constituted unlawful threats and coercion, as alleged.[29]

Based on the foregoing, I find the General Counsel met its burden to prove the allegations set forth in Paragraphs 7(a) and 10.

2. April and May 2014

Paragraph 7(b) and 10 allege that in April and May 2014, the Respondent interrogated its employees about whether they wanted to remain Union members and/or continue to be represented by the Union for the purposes of collective bargaining and other activities.

The analysis set forth directly above for the December 27 letters of resignation applies here. The purpose of the declaration was not to determine the truth of the Union's claim of majority status. The Union had not made such a claim, and HAP had already sent the Union a letter repudiating the 2013–2016 collective-bargaining agreement. The declaration was drafted by Attorney Mills and disseminated by HAP on the heels of the Union's March 2013 charges, clearly in anticipation of litigation. The purpose of the declaration was not conveyed to the employees and no assurances against reprisals were given. In light of my finding that the December 27 meeting and resignation letters were coercive, I find the declarations were a continuation of the coercive atmosphere designed to encourage employee disaffection with the Union.

I have addressed the Respondent's assertion regarding the adequacy of the pleading in footnote 27 above. The Respondent additionally asserts that paragraph 7 should be dismissed because, in the complaint, Chung is the HAP manager alleged to have interrogated the employees. The Respondent is correct that there is no evidence regarding Chung's involvement. The specific dates the employees signed the declarations, however, were listed in the complaint, and the declarations were in the Respondent's control. Under these circumstances, I find the pleading was sufficient. In any event, the matter was fully litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *HiTech Cable Corp.,* 318 NLRB 280, 280 (1995), enfd. in part 128 F.3d 271 (5th Cir. 1997).

Based on the foregoing, I find the General Counsel met its burden to prove the allegations set forth in Paragraphs 7(b) and 10.

D. Alleged Changes to Compensation

Complaint paragraphs 8 and 11 allege that the Respondent violated Section 8(a)(5) and (1) of the act when, on or around January 1, 2014, the Respondent changed unit employees' compensation by ceasing adherence to Exhibit A of the collective-bargaining agreement and changing contributions to various specified funds.

[29] The General Counsel cites to some other Board cases which are also persuasive. (GC Br. 49–50.)

Well-settled law provides that an employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

Changes to wages are a mandatory subject of bargaining. The Board has further held that "[c]hanges to a payment system involve changes to wages." *Pepsi-Cola Bottling Co. of Fayetteville, Inc*., 330 NLRB 900, 903 (2000), enfd. in relevant part 24 Fed. Appx. 104 (4th Cir. 2001). Here, the evidence shows that the rate of pay for apprentices changed on January 1, 2014, when the apprentices were classified and paid at the rate of Laborer II from State's prevailing wage rate schedule. In addition, the Respondent stopped paying into the Union's vacation, health and welfare, annuity, labor management cooperation, training, and reserve benefit funds and replaced them with funds it administered in-house. As detailed in the statement of facts, some of the fund amounts stayed the same, some changed, and some funds ceased to exist. Regardless, because changes to the payment system are a mandatory subject of bargaining, the unilateral changes HAP made in 2014 violated the Act, as alleged.[30]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees about whether they wanted to remain Union members and coercing employees into resigning their Union memberships and resigning from the Union's apprenticeship program the Respondent has violated Section 8(a)(1) of the Act.

4. By repudiating the February 1, 2013–June 30, 2016 collective-bargaining agreement and its collective-bargaining relationship with the Union, and by making changes to employees' compensation, the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having interrogated employees whether they wanted to remain Union members and coerced employees into resigning from their Union memberships and resigning from the Union's apprenticeship program, the Respondent will be ordered to cease and desist from these actions.

Having unlawfully repudiated the February 1, 2013–June 30, 2016 collective-bargaining agreement and its collective-bargaining relationship with the Union, the Respondent will be

[30] No specific testimony was elicited regarding the transportation and subsistence allowance fund. Because it is clear HAP stopped paying into all of the Union funds, it follows that either the payment system changed or payments cease, either of which is a unilateral change.

ordered to resume its collective-bargaining relationship with the Union and observe the collective-bargaining agreement as it did up to and including December 31, 2013.

With regard to employee pay, restoration to the status quo ante is presumptively appropriate to remedy unlawful unilateral changes. *Southwest Forest Industries*, 278 NLRB 228–228 (1986), enfd. 841 F.2d 270 (9th Cir. 1988). Accordingly, the Respondent will be ordered to restore the employees' pay and Union trust fund contributions and to make employees whole for any losses they incurred as the result of the unilateral changes. Any backpay owed to employees shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc*., 359 NLRB No. 44 (2012).

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 5–6 (2010). Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id., slip op. at p. 3. See, e.g*., Teamsters Local 25*, 358 NLRB No. 15 (2012).

The General Counsel has requested the special remedy of requiring Glenn Asato to read the notice to employees in the presence of a Board agent. The Board has required this remedy where an employer's misconduct has been "sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion." *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB No. 46, slip op. at 1 (2012); See also *AC Specialists. Inc.*, 359 NLRB No. 159, slip op. at 4 (2013). Though I have found numerous violations, I do not find they rise to the level of severity to warrant this remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Harry Asato Painting, Inc., Honolulu, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from interrogating employees whether they wanted to remain Union members and coercing employees into resigning from their Union memberships and resigning from the Union's apprenticeship program.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Resume its collective-bargaining relationship with the Union and observe the collective-bargaining agreement in the manner equivalent to its observation of the agreement up to and including December 31, 2013.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment:

All employees employed by Respondent in the job classifications described in the Collective Bargaining Agreement between the Painting and Decorating Contractors Association of Hawaii and the Union effective from February 1, 2013 to June 30, 2016.

(c) Within 14 days from the date of the Board's order, restore the employees' pay and Union trust fund contributions and to make employees whole for any losses they incurred as the result of the unilateral changes in the manner set forth in the remedy section above.

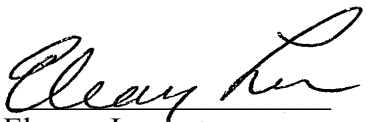
(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Honolulu, Hawaii, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 27, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

32 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. December 19, 2014



Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT coerce you into resigning their Union memberships and resigning from the Union's apprenticeship program

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL resume our collective-bargaining relationship with the Union and observe the collective-bargaining agreement in the manner equivalent to our observation of the agreement up to and including December 31, 2013.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All employees employed by Respondent in the job classifications described in the Collective Bargaining Agreement between the Painting and Decorating Contractors Association of Hawaii and the Union effective from February 1, 2013 to June 30, 2016.

WE WILL rescind changes to employees' pay and benefits, and make employees whole for any loss of earnings and other benefits resulting from the unilateral changes to pay and benefits, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

HARRY ASATO PAINTING, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-124382 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5183.